PP v. MOHD FAIZ SALLEH

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
ZAKARIA SAM JCA
ABANG ISKANDAR JCA
[CRIMINAL APPEAL NO: M-05(S)-171-06-2015]
17 FEBRUARY 2016

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – 299.45g of cannabis – Accused pleaded guilty to alternative charge under s. 6 of Dangerous Drugs Act 1952 – Appeal against sentence – Whether accused treated with unjustified leniency – Crucial factor of weight comparison of drugs – Whether taken into account – Whether accused deserved discount on imprisonment sentence – Whether sentence manifestly adequate – Public interest – Whether deterrent sentence should be imposed*

CRIMINAL PROCEDURE: *Sentence – Appeal against – Dangerous drugs – 299.45g of cannabis – Accused pleaded guilty to alternative charge under s. 6 of Dangerous Drugs Act 1952 – Appeal against sentence – Whether accused treated with unjustified leniency – Whether crucial factor of weight comparison of drugs taken into account – Whether accused deserved discount on imprisonment sentence – Whether sentence manifestly adequate – Public interest – Whether deterrent sentence should be imposed*

The respondent was initially charged for three dangerous drugs offences involving cannabis, namely for the offence of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for the first charge and for the offence of possession under s. 6 of the DDA for the second and third charge. Subsequently, the prosecution tendered an alternative charge to the first charge *ie* from trafficking to one of possession under s. 6 of the DDA punishable under s. 39A(2) of the DDA. The weight of the impugned drugs for the first charge was 299.45g of cannabis. The respondent pleaded guilty to the alternative charge to the first offence, as well as to the other two charges. He was then convicted on his own voluntary plea of guilty on all the said three charges. The judge sentenced him to eight years' imprisonment and ten strokes of the rotan for the alternative first charge, whilst for the other two charges, a sentence of one year imprisonment for each charge was imposed. Dissatisfied with the sentence imposed on the respondent for the alternative charge, the public prosecutor filed this appeal.

Held (substituting imprisonment sentence imposed from 8 to 11 years for the first charge; maintaining order of 10 strokes of rotan and imprisonment sentence for other two charges)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) Granted, a judge may come out with his own sentence, given that sentencing is essentially a matter of an exercise of a court's discretion. However, the discretion ought not to be exercised in isolation. The

offence involved was a drug possession case and it could be judicially noticed that law reports are replete with decisions of our courts which can be readily used as a guide by the sentencing courts when considering sentences to be imposed. The amount of the drugs involved is always a safe guide to use as an immediate comparison. Herein, the judge had not sufficiently addressed his mind to that crucial factor of weight comparison. (paras 16 & 17)

(2) The judge had given a further credit or discount to the fact that the respondent was not a trafficker but a self-confessed drug abuser himself. In the circumstances, the judge had taken into account a matter that was not relevant, thereby treating him with a further unjustified leniency. The respondent was not charged and convicted for an offence of drug trafficking, but for a charge of drug possession. The respondent did not deserve any further discount just because he was a drug addict and not a drug trafficker. The judge had misdirected himself in that regard. (paras 17 & 18)

(3) This was a fit and proper case where this court ought to invoke its appellate power to correct a manifest error of the judge. The sentence of imprisonment that was imposed by the judge on the respondent was manifestly inadequate. Clearly, the amount involved was about five times more than the minimum threshold amount of 50g in order to trigger the operation of s. 39A(2) of the DDA. (paras 19 & 20)

(4) Public interest will be best served by imposing a longish sentence of imprisonment on the respondent. In a case of this nature and given the circumstances of its commission, a deterrent sentence was very much in order. The public at large needed to be protected against offenders such as the respondent by putting him away in jail for a substantially longer period of time. As such, this court substituted the imprisonment sentence imposed by the judge from 8 to 11 years for the first charge. However, this court maintained the order of ten strokes of rotan as well as the imprisonment sentence of the other two charges. (para 21)

Bahasa Malaysia *Headnotes*

Responden pada mulanya didakwa atas tiga pertuduhan kesalahan dadah berbahaya melibatkan kanabis, iaitu bagi kesalahan pengedaran di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') untuk pertuduhan pertama dan kesalahan milikan di bawah s. 6 ADB untuk pertuduhan kedua dan ketiga. Kemudiannya, pihak pendakwaan menawarkan pertuduhan alternatif kepada pertuduhan pertama iaitu daripada pengedaran ke kesalahan milikan di bawah s. 6 ADB yang boleh dihukum di bawah s. 39A(2) ADB. Berat dadah berbahaya untuk pertuduhan pertama itu adalah 299.56g kanabis. Responden mengaku salah atas pertuduhan alternatif bagi kesalahan pertama, dan juga atas dua pertuduhan lain. Responden kemudiannya disabitkan atas pengakuan bersalahnya atas ketiga-tiga pertuduhan. Hakim menjatuhkan

hukuman penjara lapan tahun dan sepuluh sebatan rotan untuk pertuduhan alternatif bagi pertuduhan pertama, sementara untuk dua pertuduhan yang lain, hukuman penjara selama satu tahun untuk setiap pertuduhan yang dikenakan. Tidak berpuas hati dengan hukuman yang dijatuhkan atas responden untuk pertuduhan alternatif, pihak pendakwaan memfailkan rayuan ini.

Diputuskan (menggantikan hukuman penjara yang dijatuhkan dari 8 ke 11 tahun bagi pertuduhan pertama; mengekalkan perintah 10 sebatan rotan dan hukuman penjara untuk dua pertuduhan lain)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Diakui bahawa hakim boleh memutuskan hukumannya sendiri kerana hukuman adalah pada dasarnya hal budi bicara mahkamah. Tetapi, budi bicara tidak sepatutnya dilaksanakan secara berasingan. Kesalahan melibatkan kes milikan dadah dan ia boleh secara kehakiman diperhatikan bahawa laporan undang-undang penuh dengan keputusan mahkamah yang boleh digunakan sebagai panduan oleh mahkamah ini apabila mempertimbangkan hukuman yang perlu dijatuhkan. Jumlah dadah yang terlibat adalah panduan yang selamat untuk digunakan sebagai perbandingan. Di sini, hakim tidak mengemukakan fikiran secukupnya kepada faktor penting iaitu perbandingan berat.

(2) Hakim telah mengambil kira fakta bahawa responden bukan pengedar tetapi seorang yang mengaku bahawa dia adalah penyalahguna dadah. Dalam keadaan ini, hakim mempertimbangkan perkara yang tidak relevan, dengan itu melayannya dengan kelembutan tidak berasas. Responden tidak dipertuduh dan disabitkan dengan pertuduhan pengedaran dadah, tetapi untuk milikan dadah. Responden tidak berhak mendapat pengurangan dalam hukumannya hanya kerana dia adalah penyalahguna dadah dan bukan pengedar dadah. Hakim telah tersalah arah dalam hal ini.

(3) Ini adalah kes yang sesuai dan teratur di mana mahkamah harus menggunakan kuasa rayuan untuk memperbetulkan kekhilafan hakim itu. Hukuman penjara yang dikenakan oleh hakim ke atas responden nyata tidak memadai. Jumlah yang terlibat jelas lima kali ganda lebih daripada nilai ambang minimum 50g yang diperlukan untuk membangkitkan operasi s. 39A(2) ADB.

(4) Kepentingan awam akan lebih dilaksanakan dengan menjatuhkan hukuman penjara yang lama terhadap responden. Dalam kes seperti ini dan memandangkan keadaannya, hukuman bersifat pencegahan amat diperlukan. Orang awam perlu dilindungi daripada pesalah-pesalah seperti responden dengan memasukkannya ke dalam penjara untuk satu tempoh masa yang lebih panjang. Oleh itu, mahkamah ini menggantikan hukuman penjara yang dijatuhkan oleh hakim dari 8 ke 11 tahun untuk

pertuduhan pertama. Walau bagaimanapun, mahkamah ini mengekalkan perintah sepuluh sabitan rotan dan juga hukuman penjara dua pertuduhan lain.

Case(s) referred to:
PP lwn. Abdul Halim Ishak & Satu Lagi [2013] 9 CLJ 559 CA ***(refd)***
PP v. Ling Leh Hoe [2015] 4 CLJ 869 CA ***(refd)***
PP lwn. Marzuki Kahar [2014] 1 LNS 1781 CA ***(refd)***
PP v. Norazian Zakari B-05-178-07-2014 (Unreported) ***(refd)***
PP v. Shahrulnizam Borhan J-05[S]-6-01-2014 (Unreported) ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 39A(2), 39B(1)(a)

For the appellant - Jasmee Hameeza Jaafar; DPP
For the respondent - Azamuddin Abd Aziz; M/s Azamuddin & Co

[Editor's note: Appeal from High Court, Melaka; Criminal Appeal No: 45A-09-09-2014 (allowing appeal in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abang Iskandar JCA:

[1] This is an appeal by the Public Prosecutor against sentence imposed by the High Court on the accused person, Mohd Faiz bin Salleh ("the respondent").

[2] The respondent was initially charged for three dangerous drugs offences involving cannabis namely:

(a) Section 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA")

(b) Section 6 of the DDA punishable under the same section

(c) Section 6 of the DDA punishable under the same section

[3] Subsequently, the prosecution tendered an alternative charge to the first charge ie, from trafficking to one of possession under s. 6 of the DDA punishable under s. 39A(2) of the DDA. The weight of the impugned drugs for the first charge was 299.45g of cannabis.

[4] The respondent had then pleaded guilty to the alternative charge to the first offence, as well as to the other two charges. He was then convicted on his own voluntary plea of guilty on all the said three charges.

[5] After hearing submissions on sentence from both parties, the learned judge had sentenced him to eight years imprisonment and ten strokes of rotan for the alternative first charge, whilst for the other two charges, a sentence of one year of imprisonment for each charge imposed. All the imprisonment sentences were ordered to take effect from the date of his arrest on 24 June 2014, and further, it was ordered that they were to run concurrently.

[6] Dissatisfied with the sentence imposed on the respondent for the alternative charge, the Public Prosecutor had duly filed this appeal. A

Brief Facts Of The Case

[7] The facts of the case were rather straightforward. On 24 June 2014, about 12.30pm, one Insp Noorefeendy bin Mokhtarudin together with his team of police personnel from Jabatan Siasatan Jenayah Narkotik, Ibu Pejabat Kontinjen Polis Melaka in "Ops Tapis" arrested the respondent, who was at that time in the midst of refuelling his red Honda car bearing registration number WLG 554, at Petron Cheng Petrol Station. B

[8] A body search was conducted on the respondent. As a result of the search, the police found one plastic packet containing slabs of dried leaves suspected to be cannabis in the respondent's small front pocket of his blue jeans that he was then wearing. C

[9] The search was later extended to the respondent's car where the police team found one blue black sling bag written "Chelsea Football Club" on the driver side floor mat. Upon opening the bag, Insp Noorefeendy found a "Peter Stuyvesant" cigarette box containing four transparent plastic packet which wrapping slabs of dried leaves suspected to be cannabis. Insp Noorefeendy also found the respondent's identity card in the blue black bag. D

[10] The police team later went to the respondent's house at No. 21, Jalan Cheng Perdana 1/34, Taman Desa Cheng Perdana 1, Cheng, Melaka. In the master bedroom, the police team found one black sling bag under the bed. Upon opening the bag, Insp Noorefeendy found two slabs of dried leaves wrapped by transparent plastic and six packet transparent plastic containing dried leaves suspected to be cannabis. E F

[11] All the impugned drugs were later sent to the chemistry department. Based on the chemist report (exh. P21), it was certified that the impugned drugs found were cannabis weighing of 299.45g, 16.17g, and 1.49g which are the basis for all the three charges framed against the respondent respectively. G

Finding Of The Learned High Court Judge

[12] Having convicted the respondent, we noted that in passing the sentences, the learned judge had taken into account the respondent's plea of guilty which he reckoned had saved judicial time and costs. It was confirmed too that this respondent had no previous conviction. The other mitigating factors considered by the learned trial court judge were the respondent at that material time had worked as a technician who supported his wife and two children, one of whom was suffering from pneumonia. On the fateful day, he was on his way to visit his son at the hospital. His plea of guilty showed that he was remorseful of his wayward ways that had led him to his present troubles with the law. H I

[13] For the aggravating factors, the Deputy Public Prosecutor, as usual advanced the public interest factor and the rampancy of drugs cases throughout the country as grounds upon which a deterrent sentence ought to be meted out.

[14] The learned trial judge, based on his grounds of judgment, apart from taking into consideration submissions by both parties, had also taken into consideration the fact that the sentence provided for the offence under s. 39(A)(2) of the DDA was amended by increasing the term of imprisonment from 20 to life imprisonment (interpreted to mean 30 years imprisonment) to show the seriousness of the offence. He also indicated that the weight of the drugs was also the subject of his consideration.

[15] All parties agreed in principle that the respondent was deserving of a discount in terms of his imprisonment sentence. We found nothing wrong in that. A further perusal of the appeal records by us had shown that the learned judge had referred to the case of *Abdul Halim Ishak & Satu Lagi* [2013] 9 CLJ 559 and *PP v. Ling Leh Ho* [2015] 4 CLJ 869. In earlier case the court imposed the imprisonment sentence of ten years and ten strokes of rotan for the drugs weighing of 11,120g while the later the court imposed ten years of imprisonment plus ten strokes of rotan for the drugs weighing 390.76g. In imposing the eight years imprisonment and ten strokes of rotan by comparing the present case with these two cases, the learned High Court Judge opined that:

> Kesemua pesalah dalam kes-kes di atas telah diberikan sebatan minima sebanyak sepuluh sebatan. Pada pendapat saya, hukuman sebatan sebegitu tidak boleh dianggap sebagai satu hukuman yang ringan. Parut yang ada di badan setiap OKT akibat sebatan akan sentiasa mengingatkan OKT dan sesiapa sahaja yang melihat akan kesan sebatan tersebut tentang bahayanya berjinak dengan dadah. Saya percaya hukuman sebatan sebegini mencerminkan faktor 'deterrent' bagi tujuan memberi pengajaran kepada OKT dan juga masyarakat.

Our Finding

[16] However looking at the grounds of judgment of the learned judge we could not see that he had sufficiently considered the sentencing trend in cases with similar circumstances. Granted that a judge may come out with his own sentence, given that sentencing is essentially a matter of an exercise of a court's discretion, still, it is our view that the discretion ought not to be exercised in isolation. We noted that the offence involved was a drug possession case and it can be judicially noticed that the law reports are repleted with decisions of our courts which can be readily used as a guide by the sentencing courts when considering sentence to be imposed. In this regard, the amount of the drugs involved is always a safe guide to use as an immediate comparison. We were aware of cases where the courts had

imposed more heavy sentences of imprisonment for lesser amounts involved in the possession of the accused persons. For example, in the case *PP v. Norazian Zakari* B-05-178-07-2014, the court imposed 13 years of imprisonment and ten strokes of rotan for the possession of 320g of cannabis. In the case of *PP v. Shahrulnizam Borhan* J-05[S]-6-01-2014, for possession of 248g of cannabis, the sentence of imprisonment was enhanced from eight years to ten years by the Court of Appeal. In the case of *PP lwn. Marzuki Kahar* [2014] 1 LNS 1781, a sentence of imprisonment of seven years for possession of 232.05g of Cannabis was enhanced on appeal to 11 years by the Court of Appeal.

[17] In this case, we could not see in his grounds that he had sufficiently addressed his mind to that crucial factor of weight comparison. Add to that the fact that the learned judge had given a further credit or discount to the fact that the respondent was not a trafficker but a self-confessed drug abuser himself, we were of the considered view that in the circumstances, the learned judge had taken into account a matter that was not relevant, by considering the fact that the respondent was not a trafficker and thereby treating him with a further unjustified leniency. It has to be borne in mind that the respondent was not charged and convicted for an offence of drug trafficking, but for a charge of drug possession. In short, the respondent did not deserve of any further discount just because he was a drug addict and not a drug trafficker.

[18] As such, we were of the view that the learned judge had misdirected himself in that regard.

[19] We were therefore in agreement with the learned deputy that this was a fit and proper case where we ought to invoke our appellate power to correct a manifest error of the learned judge. We agreed that the sentence of imprisonment that was imposed by the learned judge on the respondent was manifestly inadequate, in the circumstances of this case.

[20] Clearly, the amount involved was about five times more than the minimum threshold amount of 50g in order to trigger the operation of s. 39A(2) of the DDA.

[21] In criminal cases, public interest is paramount. Although the sentencing court may legitimately consider factors favouring the convict in passing sentence, in the final analysis, the court is always faced with the question as to how the public interest can be best served in dealing with the convicted person. In a case such as the one immediately before us, clearly public interest will be best served by imposing a longish sentence of imprisonment on the respondent. In a case of this nature and given the circumstances of its commission, a deterrent sentence was very much in order. The public at large needed to be protected against offenders such as

A the respondent by putting him away in jail for a substantially longer period of time. We were mindful that the maximum imprisonment term for this offence as provided by the law is life imprisonment, which translates to 30 years imprisonment. As such, we had substituted the imprisonment sentenced imposed by the learned High Court Judge from 8 to 11 years for
B the first charge. However we maintained the order of ten strokes of rotan as well as the imprisonment sentence of the other two charges. We also maintained the order of the High Court Judge that the imprisonment sentences to run concurrently from the date of his arrest.

[22] Order accordingly.

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